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In The

Supreme Court of the United States

October Term, 1966

No. 1160

ALLEN N. BRUNWASSER,
Petitioner

vs.

PITTSBURGH NATIONAL BANK, a Corporation, and JOHN S. WARWICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALLEN N. BRUNWASSER,
Petitioner.

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Pittsburgh, Pa. 15219.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Allen N. Brunwasser prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the District Court for the Western District of Pennsylvania (101a-104a) [1] are reported at 14 A.F.T.R. 2d 6066. The opinion of the Court of Appeals (Appendix, infra, p. 40) is reported at 351 F. 2d 951.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 12, 1965 and a Petition for Rehearing was denied on December 27, 1965 (Appendix, infra, p. 41). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

[1] "A" references are to the Petitioner's Appendix printed as a part of the Brief for Petitioner in the Court of Appeals.

QUESTIONS PRESENTED

I. Whether summary judgment entered previous to requested written and oral discovery complies with the requirements of Federal Rule of Civil Procedure 56 and/or curtails the right to jury trial fact finding provided by the Seventh Amendment to the United States Constitution as reinforced by 28 U.S.C. 2702 and Federal Rule of Civil Procedure 38 (a):

(1) when there was a genuine dispute as to all material facts;

(2) when the moving parties were not clearly entitled to judgment as a matter of law;

(3) where the affidavit of one defendant was not made on personal knowledge and did not set forth facts admissible in evidence or show he was competent to testify to them;

(4) where unsworn testimony of defense attorneys was received;

(5) where defense witnesses who had exclusive and peculiar knowledge and were interested filed no affidavits and were not produced;

(6) where, although required to be identical, documents filed and presented by each defendant differed as did those of one defendant with each other;

(7) where doubt was resolved in favor of the moving parties and the Court determined all disputes

of fact, credibility and inferences in their favor, relying in part, on past personal experiences in similar cases;

(8) where the Court assumed facts not in evidence and blocked requests for oral and written discovery upon objection of defendants and

(9) continued the original hearing for subsequent testimony and argument but then reversed its position and entered judgment without previous notice.

II. Is the judicially conceived doctrine of absolute immunity to be extended to an Internal Revenue Agent who

(1) collects oral and documentary evidence from a taxpayer's bank without service of a summons required by 26 U.S.C. 7602 (2), 26 U.S.C. 7603, 26 C.F.R. 301.7602, 26 C.F.R. 301.7603 and the 1955 Cumulative Bulletin, pp. 904-905;

(2) does not take the testimony under oath as required by 26 U.S.C. 7602 (3);

(3) does not give the 10 days' notice required by 26 U.S.C. 7605 (a);

(4) reopens a closed year without authority and contrary to the 1959 Cumulative Bulletin, pp. 938-939 found in 26 C.F.R. 601.105;

(5) collects information that is not necessary and is already in the possession of the Commissioner contrary to 26 U.S.C. 7605 (b) and irrelevant and immaterial information contrary to 26 U.S.C. 7602(1);

(6) uses the administrative process of 26 U.S.C. 7602 to prepare a potential criminal prosecution and

not for legitimate tax assessment but for his own personal aggrandizement.

(7) collects and turns over to his superiors false information which results in a Bureau investigation into plaintiff's affairs;

(8) directs taxpayer's bank to breach its obligation not to disclose his affairs without his consent;

(9) conspires with said bank not to notify taxpayer and thus prevent his objection and right of appeal from an adverse decision permitting the investigation, and does this protection shield a bank deliberately cooperating with the agent when it not only gives him false information contrary to its records but subsequently attempts to conceal from its depositor what has occurred or should the Court permit financial sanction by exercise of its supervisory power over government agents under the above facts?

III. What notice and by whom must be given to a taxpayer when a Revenue Agent requests confidential information from his bank with 26 U.S.C. 7602 process or without it?

IV. Can action which violates the Fourth Amendment, statute, regulation and Internal Revenue Practice be within the scope of authority of a Revenue Agent?

V. Should leave to amend be permitted previous to entry of Summary Judgment if request is made previous to expiration of the statute of limitations?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF PROCEDURE AND REGULATIONS INVOLVED

Fourth Amendment to the United States Constitution.

Seventh Amendment to the United States Constitution.

28 U.S.C. Section 2072.

Federal Rule of Civil Procedure 38 (a) found in 28 U.S.C.

26 U.S.C. 7602, 7603, 7605.

26 C.F.R. 301.7602-1, .7602-1, .7605-1.

42 U.S.C. Section 1985 (3).

18 U.S.C. Sections 241, 242.

26 U.S.C. Section 7214.

5 U.S.C. Section 1002(b).

1959 Cumulative Bulletin, pp. 938-939, 26 C.F.R. 601.105.

1955 Cumulative Bulletin, pp. 904-905.

Federal Rule of Civil Procedure 56 found in 28 U.S.C.

Federal Rule of Civil Procedure 12 (c) found in 28 U.S.C.

Federal Rule of Civil Procedure 24 (a) found in 28 U.S.C.

[The text of the above appears in the above order, infra, pp. 24-40.]

STATEMENT OF THE CASE

Here involved is an appeal from the Judgment of the Third Circuit Court of Appeals (Appendix 40) affirming an Order of the United States District Court for the Western District of Pennsylvania (101a-104a) which entered summary judgment in favor of defendants previous to answer and without requested discovery and argument made by plaintiff.

Plaintiff, in the Court of Common Pleas of Allegheny County, Pennsylvania, entered summons in assumpsit against John S. Warwick (Warwick) and Pittsburgh National Bank (PNB). Upon motion of the United States Attorney, the case was removed to the Federal District Court [2] which directed a complaint be filed.

When this was done (6a-8a), it appeared plaintiff claimed damages because PNB, without notice to him, had not only permitted Warwick (conspiring with others who were to be named when discovery identified them) to examine its employees and records concerning him, contrary to its contractual duty of privacy and secrecy, but had given this person false information knowing he would turn it over to the Internal Revenue Service, which, misled by the erroneous facts, caused plaintiff severe difficulty which would have been avoided had the required IRS code and regulation procedure been followed and he notified, whereupon the error would not have been made.

[2] Under authority of 28 U.S.C. 1340, 1441, 1442.

Warwick, identifying himself as an Internal Revenue agent, assigned to audit plaintiff's 1961 return and alleging that having discovered irregularities he obtained the records for 1959-1961 by service of a 7602 summons (his Exhibit A (31a)) on the bank, claimed immunity and moved for summary judgment (9a-10a).

This summons, allegedly directed to PNB at Fifth and Wood Streets, named no person as its target but showed written thereon the names of four individuals at different locations and a certification of service on a "Mr. Bell" (PNB App. 1b), not otherwise identified as to description, position or location, which deficiency likewise applied to the others, William Callaghan, Ed Wentworth, and Leo Laughren, for whom no certification appeared.

No claim was asserted that testimony was taken as required under oath on the summons which was returnable "immediately" rather than not less than 10 days as required by the statute and regulations controlling the situation (33a, 34a, 36a).

PNB also requested summary judgment (11a-12a) relying for its protection upon an alleged 7602 summons (its Exhibit A (31a)) which curiously differs from that relied upon by Warwick because the names of Calaghan, Wentworth and Laughren nowhere appear thereon.

In addition, S. Knox Hunter, the affiant, is obviously incompetent having no direct knowledge of what occurred. Those who do signed no affidavit (11a-12a).

Plaintiff filed counter-affidavits (19a-28a) alleging that the summons was not served, but left with the bank as a courtesy subsequent to carte blanche inspection of all records and personnel without limit, even though Warwick

and the bank knew this was forbidden by 26 U.S.C. 7602-7605 and the Internal Revenue Regulations and Practice and because plaintiff had been audited for the years 1959 and 1960 and no commissioner's letter had reopened these years or authorized Warwick to reinvestigate them.

The propriety of the procedure was also attacked as directly contrary to the 10 day notice, testimony under oath and service on the person involved provisions of the controlling statutes and regulations.

After alleging the bank and Warwick willfully and deliberately used this technique not only to avoid the impact and protection of the statutes, regulations and usual practice, but also to deprive him of these federal benefits, to prevent his objection and right to appeal an adverse decision by deliberate non-notice and to illegally collect information for a contemplated criminal action, plaintiff asserted lack of statutory jurisdiction of Warwick and claimed damages for invasion of privacy, breach of the duty of secrecy on the part of the bank joined by Warwick, abuse of process under federal and state law and invasion of his civil rights, both under 42 U.S.C. 1985 (3) and the penal sanction of 18 U.S.C. 241, 242 on the basis of which the court was asked to exercise its supervisory power over federal agents and to create a common law cause of action in addition to those which already exist.

After incorporating his counter-affidavit as denial to the petition for removal which alleged activity within the scope of Warwick's authority, plaintiff, taking the position that the agent not only was without power but acting directly contrary to specific limits placed upon him by Congress and the Internal Revenue Regulations and Practice, asked for summary judgment as to liability (28a-30a).

As permitted by Rule 56 (f), plaintiff had served written interrogatories upon Warwick in an attempt to have actual facts on record as to what occurred at the bank (40a-42a), but this procedure was frustrated by the Court, Gourley, C.D.J., after objection by the United States Attorney (43a-44a).

On October 1, 1964 (46a), disposition of the respective motions was begun by the District Court (Gourley, C.D.J.), which heard preliminary discussion and testimony of the "Mr. Bell" allegedly served with the 7602 summons whereupon the hearing was continued to a later undetermined date (81a, 85a, 86a) at which witnesses suggested by plaintiff in a letter (88a-90a), to be and which was filed in five days would appear and be deposed under control of the court which would then hear argument (81a).

At the hearing, Warwick's Exhibit 1 was different than the bank's Exhibit 2 (55a), which also differed from its Exhibit A (37a), which was filed with its motion for summary judgment (31a).

Subsequently, plaintiff's additional interrogatories, attempting to show voluntary disclosure by defendants without 7602 summons in similar investigations involving plaintiff and others and thus to impeach their bald assertion a summons was used in this case (91a-93a; 96a-97a), were objected to by defendants (94a-95a) and ordered withdrawn by the court (100a) which on November 10, 1964, entered summary judgment for both defendants without fulfilling its original promise to hear additional evidence and argument (101a-104a). The Third Circuit Court of Appeals affirmed the above action (Appendix 40) whereupon this petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

The decision of the District Court affirmed by the Third Circuit Court of Appeals has now established a new theory of absolute blockade against all suits for damages brought against Revenue Agents and/or cooperating third parties by ruling that the mere filing of an affidavit containing an allegedly served 26 U.S.C. 7602 process forecloses all discovery and requires termination of the case regardless of the allegations contained in the complaint or affidavits resisting the motion for summary judgment or damage suffered (45a, 66a, 67a).

Not only does this deprive petitioner of his Seventh Amendment right to a jury trial "according to the rules of the common law" as reguaranteed by Congress [3] and the Supreme Court of the United States [4] and the decisions interpreting these provisions [5] when all the facts are in the possession of hostile and interested adverse parties [6] but it also overrules the decisions of this Court providing for virtually unlimited discovery and concerning the manner of and circumstances under which Federal Rule of Civil Procedure 56 and in particular the pre-summary judgment investigatory and impeachment provisions of subsection (f)

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[3] 28 U.S.C. 2072.

[4] Federal Rule of Civil Procedure 38(a).

[5] *Beacon Theatres v. Westover*, 359 U. S. 500, 501; *Simler v. Conner*, 83 S. Ct. 609, 610, 611, 372 U. S. 221, 222, 223.

[6] *Sartor et al. v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 628; *Poller v. C. B. S.*, 368 U. S. 464, 468, 470, 473.

will be applied[7] by preventing all interrogation of any knowledgeable witnesses either for discovery or impeachment when material facts are in dispute.[8]

The mere filing of an affidavit by the Revenue Agent (10a) reinforced by hearsay affidavit of a bank officer (12a) now gives a conclusive presumption of regularity in conflict with the applicable decisions of the United States Supreme Court[9] and no permission to rebut this when the record (31a) indicates the contrary is given[10] and even though 26 U.S.C. 7603 gives certificate of service of 7602 summons mere weight in even an enforcement proceeding, it is now given conclusive effect as a complete bar to investigation or challenge.[11]

Even though knowledgeable witnesses, many of whose identity is known only to defendants, do not appear, the favorable inference permitted from this is disregarded[12] and non-production of defense and government witnesses for cross-examination[13] previous to entry of summary judgment is now approved.[14]

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[7] *Hickman v. Taylor*, 329 U. S. 495; *Schlagenhauf v. Holder*, 85 S. Ct. 234, 379 U. S. 104.

[8] *Fountain v. Filson et ux.*, 336 U. S. 681, 683.

[9] *Heiner v. Donnan*, 285 U. S. 312, 329; *Carrington v. Rash*, 85 S. Ct. 775, 780, 380 U. S. 89.

[10] *St. Joseph Stockyard Company v. U. S.*, 298 U. S. 38, 52.

[11] *Aetna Life Insurance Company v. Ward*, 140 U. S. 76, 90.

[12] *Interstate Circuit, Inc. v. U. S.*, 306 U. S. 208, 226.

[13] *Campbell v. U. S.*, 365 U. S. 85, 96; *Campbell v. U. S.* 373 U. S. 487, 496; *Pointer v. Texas*, 85 S. Ct. 1965, 1068, 380 U. S. 400.

[14] *Campbell v. U. S.*, 365 U. S. 85, 96; *Campbell v. U. S.*, 373 U. S. 487, 496; *Pointer v. Texas*, 85 S. Ct. 1065, 1068, 380 U. S. 400.

Even though the Revenue Agent gives no oral testimony when available (77a), the only witness produced does not know what occurred when the evidence was allegedly obtained (75a) and the summary judgment affidavit of Pittsburgh National Bank is hearsay [15] (11a-12a) and both the alleged original 7602 summons and that allegedly served on PNB are introduced by counsel who are unsworn [16] (57a), this procedure is approved and plaintiff deprived of his day in Court [17] and the opportunity to intervene when protection of his rights is involved.[18]

Not only does the decision accept Warwick's affidavit of authority at face value and block examination even though his superiors file no supporting affidavit or give testimony to back him up,[19] but the Third Circuit Court of Appeals sanctions disposition of cases without opportunity to present evidence and make argument in the District Court [20] contrary to applicable Federal decisions and the usual and accepted judicial course of proceeding,[21] but it also ignores the record by approving unsworn testimony to be taken on subpoena duces tecum contrary to the code

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[15] *Automatic Radio Manufacturing Co., Inc. v. Hazeltine Research, Inc.*, 339 U. S. 827, 831, f.n. 4.

[16] *Lynn v. Smith et al.*, 281 F. 2d 501, 507 (3 C.C.A.).

[17] *Leh v. Gen'l. Petroleum Corporation*, 86 S. Ct. 203, 210.

[18] Federal Rule of Civil Procedure 24(a); *Kaufman et al. v. Soc. Int., etc.*, 343 U. S. 156, 161; *International Union United A.A. Imp. Workers v. Scofield*, 86 S. Ct. 373, 379.

[19] *Howard v. Lyons*, 360 U. S. 593, 597.

[20] *Morgan v. U. S.*, 304 U. S. 1; *Londoner v. City and County of Denver*, 210 U. S. 373.

[21] The Third Circuit condemned this practice Nov. 23, 1965 in *Urbano v. Calissi*, 353 F. 2d 197.

requirements of 26 U.S.C. 7602 [22] (26a, paragraph 6; 52a-53a, 61a, 73a).[23]

The decision of the Third Circuit is contrary to the holdings of the Second Circuit giving an absolute right of investigation previous to entry of summary judgment when the credibility of opposing witnesses who have peculiar knowledge is involved.[24]

Since the duty of PNB not to disclose a depositor's affairs is contractual [25] any absolute immunity given Warwick under the judicially created doctrine of absolute im-

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[22] *Bridges v. Wixon,* 326 U. S. 135, 153; *Vitarelli v. Seaton,* 359 U. S. 535, 539; *Jones v. S.E.C.,* 298 U. S. 1, 26.

[23] Process for records does not include testimony. *Essgee Co. v. U. S.,* 262 U. S. 151, 157; *Shapiro v. U. S.,* 335 U. S. 1, 27; *Hale v. Henkel,* 201 U. S. 43, 68.

[24] *Subin v. Goldsmith,* 224 F. 2d 753; *Alvado v. General Motors Corporation,* 229 F. 2d 408, 410, 411; *Broadcast Music v. Havana-Madrid Restaurant Corporation,* 175 F. 2d 77, 79.

[25] *Tournier v. National Provincial and Union Bank of England,* 1 K.B. 461 (1924 decision of highest judicial Court of England); *Peterson v. Idaho First National Bank,* 367 P. 2d 284 (1962); *Board of Trade of Chicago v. Christie Grain and Stock Company,* 198 U. S. 236, 250, 251 (1905) approved *Associated Press v. U. S.,* 326 U. S. 1, 15, f.n. 14 (1944); *Patton's Digest* (prepared as guide for American Banker's Association) August, 1962 Supplement, Section 19, pp. 4 and 5; Sec. 19 (1), p. 619, p. 627 (collecting text authority); 80 *Banking Law Journal* 28, 29, 32; 73 *Banking Law Journal* 163, 164; 25 *Columbia Law Review* 152, 154, 157, 158; *Corpus Juris Secundum,* Banks and Banking, Section 271 (c); John T. Morse, Jr., "Law of Banks and Banking", Sixth Edition, Vol. 1, Section 294(a); Michie, "Banks and Banking", Permanent Edition, Vol. 5(b), Chapter 9, Section 308, p. 186; *Brex v. Smith,* 104 N. J. Eq. 386, 388 (1929); *Seven Am. Jur., Banks,* Section 196, p. 150.

munity [26] should not insulate it from financial sanction [27] especially when it gives false information contrary to its records (45a) and then attempts to conceal its error (53a) with resulting investigation of petitioner's affairs by the Internal Revenue Service (52a) some of the details of which are set out in his testimony before Senator Long's committee investigating this bureau.[28]

Proper issue, service and procedure under the 7602 process which would protect PNB was found as a fact by the District Court (103a-104a) which rejected the denial of petitioner (20a, paragraph 8, 25a, 26a, paragraph 6, 27a, 30a, 53a) prevented discovery and ignored the evidence barren record [29] containing only the testimony of a bank employee who knew nothing concerning the manner in which petitioner's affairs were investigated (75a).

Warwick, having no inherent power [30] is created, controlled and limited by statute, regulation and bureau pro-

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[26] *Barr v. Matteo,* 360 U. S. 564.

[27] *Restatement of Torts,* Section 914; *Harper, Law of Torts,* Section 6.4, Vol. 1, p. 486; *Sir. John Salmond "The Law of Torts,"* Seventh Edition, Section 550, pp. 150-151; *Foltz v. Moore-McCormack Lines, Inc.,* 189 F. 2d 537, 540 (2 C.C.A.) (Information given to F.B.I. qualifiedly privileged only.)

[28] "Invasion of Privacy" (Government Agencies) "Hearings before the Sub-Committee on Administrative Practice and Procedure of the Committee of the Judiciary U. S. Senate Eighty-ninth Congress, first session pursuant to S. Res. 39 Part 3. For testimony of petitioner see pp. 1169-1189.

[29] *Guzman v. Pichirilo,* 369 U. S. 698, 701, 702.

[30] *Youngstown Sheet and Tube Co. et al. v. Sawyer,* 343 U. S. 579, 584, 585.

cedure, must "obey the law scrupulously" [31] and cannot expand his power beyond its given limitation.[32]

Since both Warwick and PNB knew the years 1959 and 1960 had been examined, audited and closed (16a, 17a, 19a, 23a, 25a, 27a, 28a, 65a, etc.) further investigation was barred without direction from superior authority (107a-109a). His defiant action is without jurisdiction [33] especially since he was only assigned to the year 1961 (10a). His assertion "it appeared to me that there might be irregularities in the years 1959 and 1960" would afford no protection nor satisfy the "necessary" and "relevant" requirements imposed on even a higher echelon [34] especially when the information is already in Internal Revenue hands (22a, 24a).

Not only is activity beyond given authority jurisdictionless [35] but Warwick's recommendation that PNB breach its contract of secrecy with petitioner is actionable,[36] especially when lack of jurisdiction is known (p. 494).

The policy to encourage fearless administration [37] should not be extended to cover illegal and disobedient ac-

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[31] *Elkins v. U. S.*, 364 U. S. 206, 223; *Constable v. National Steamship Company*, 154 U. S. 51.

[32] *Manhattan General Equipment Company v. C.I.R.*, 297 U. S. 129, 134.

[33] *Larson v. Foreign and Domestic Corporation*, 337 U. S. 682, 691, f.n. 12.

[34] *U. S. v. Mann*, 95 U. S. 580, 581, 583; 26 U.S.C. 7602, 7604, 7605(b); *C.A.B. v. Hermann et al.*, 353 U. S. 322, 323; *U. S. v. Powell*, 379 U. S. 48, 55, 57, 85 S. Ct. at p. 255.

[35] *Larson*, supra, 337 U. S. 682, 695.

[36] *Spalding v. Vilas*, 161 U. S. 483, 491.

[37] *New York Times v. Sullivan*, 376 U. S. 254, 282, 283, f.n. 23.

tions especially in the lower ranks.[38] Since "collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting taxes"[39] they should receive no protection when they act contrary to orders.[40]

Even the Solicitor General of the United States admits that unauthorized used of this ministerial[41] process is compensable.[42]

The supervisory power of this Court[43] should be exercised to limit immunity under the facts of this case especially when 26 U.S.C. 7602 civil process was used for collection of expected criminal evidence (19a, 22a, 25a),[44] and the aggrandizement of Warwick (19a) or for any other perverted or improper purpose[45] or when revenue agents and third parties conspire to circumvent the intervention provisions granted by *Reisman v. Caplin*[46] and Federal

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[38] *Barr v. Matteo*, 360 U. S. 564, 573-575.

[39] *Royal Indemnity Company v. U. S.*, 313 U. S. 289, 294.

[40] 70 *Harvard Law Review*, 827, 837 approved (dissenting opinion) in *Wheeldin v. Wheeler*, 83 S. Ct. 1441, 1446, 373 U. S. 647, 653; *Marbury v. Madison*, 1 Cranch 137; *Hearst v. Black*, 87 F. 2d 68 (C.A.D.C.); *McMann v. S.E.C.*, 87 F. 2d 377, 379.

[41] *Lewis v. N.L.R.B.*, 357 U. S. 10, 15.

[42] *Wheeldin v. Wheeler*, 373 U. S. 647, 651. See also 77 *Harvard Law Review* 136, 137.

[43] *McNabb v. U. S.*, 318 U. S. 332; *Upshaw v. U. S.*, 335 U. S. 410.

[44] *Abel v. U. S.*, 362 U. S. 217, 226, 230; *Reisman v. Caplin*, 84 S. Ct. at 513, 375 U. S. at 449.

[45] *Roncarelli v. Duplessis*, 16 D.L.R. 2d 689 (1959) (highest judicial Court of Canada); *Restatement of Torts*, Section 682, Comment a.

[46] 84 S. Ct. at 511, 375 U. S. 445.

Rule of Civil Procedure 24 (a) and deprive petitioner of his day in Court [47] and the right of appeal.[48]

Although Warwick claims to have issued the 7602 process, the different documents (31a) which do not appear to comply with the exact duplicate requirements of the 1955 Cumulative Bulletin (36a) creates some doubt. This Court is not required to rubber stamp the agent's assurance that everything has been properly performed [49] especially in light of the decay which has been exposed in this branch of our bureaucracy [50] and the failure of Warwick's superiors to back him up by corroborating affidavit of authority.

Certainly, if no process was issued, neither defendant could claim the proceeding was proper or within the agent's jurisdiction.[51]

Failure to notify the taxpayer [52] or preventing his intervention [53] when a bank is requested to furnish the Internal Revenue Service with information concerning his

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[47] *Kaufmann et al. v. Soc. Int. Pour. Par. Ind., etc.*, 343 U. S. 156, 161.

[48] *Estep v. U. S.*, 327 U. S. 114, 121; *Leedom v. Kyne*, 358 U. S. 184, 189.

[49] *Ker v. California*, 374 U. S. 23, 34; *Howard v. Lyons*, 360 U. S. 593, 597.

[50] See Senate Investigation f.n. 28; *Newsweek*, July 26, 1965, p. 28, column 1.

[51] *Noble v. Union, etc.*, 147 U. S. 165, 172; *Hick's Estate*, 414 Pa. 131, 135, 136; *Yaselli v. Goff*, 12 F. 2d 396, 405, 406, affirmed per curiam, 275 U. S. 503.

[52] *U. S. v. Powell*, 85 S. Ct. at 251.

[53] *Reisman v. Caplan*, 375 U. S. at 449, 84 S. Ct. at 513.

account should be jurisdictionless when preliminary process requirements are ignored.[54]

26 U.S.C. 7602, 7603, and 7605 together with the regulations and directed procedure discussed above establish guidelines of required and prohibited action which defendants intentionally conspired to violate. Because of this, plaintiff has been deprived of the right to object and resist what he termed an illegal and unnecessary investigation. The rights are given him by statute and Court interpretation. They have been taken from him. Certainly, he has a cause of action.

The Third Circuit has approved entry of summary judgment in favor of a Revenue Agent who defied both the statute of his creation and the orders of his bureau superiors in collecting information which neither defendant denies was not only false but caused petitioner harm.

Not only could Warwick not be within the scope of his authority when so acting, but his investigation without the service of 7602 process violated the Fourth Amendment[55] prohibition against unlawful search or seizure which cannot be within his scope of authority.[56]

Warwick's ministerial duty to serve a 7602 process permitted no range of discretion. His actions were controlled by statute, regulation and procedural command.[57] Leniency to him will only encourage others. Since the

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[54] *Hatahley v. U. S.* 351 U. S. 173.

[55] *Watkins v. U. S.*, 354 U. S. 178, 198, 206; *Jones v. S.E.C.*, 298 U. S. 1, 26; *Brown v. U. S.*, 359 U.S. 41, 49; *Hale v. Henkel*, 201 U. S. 43 (concurring opinion of Justice McKenna at p. 81).

[56] *Hughes et al. v. Johnson*, 305 F. 2d 67, 70 (9 C.C.A.).

[57] *Kendall v. U. S.*, 12 Peters 524, 610 (1838).

average person obeys an administrative summons either because of ignorance or lack of desire to litigate and obtain notoriety especially in dealing with the powerful and feared Internal Revenue Service, the hearing rule of *Reisman v. Caplin* is no protection at all. The average person does not resist.[58]

The judge-made doctrine of immunity should be molded to fit the circumstances of each case under this Court's power of supervision over activity of Federal Agents. The rule is placing bureaucracy above the law.[59] Most violations go unreported due to lack of and fear of complaints against the all powerful government unlimited as to resources, personnel and time. With knowledge the courts will absolve them, the bureaucrats act accordingly. Petitioner (72a) makes mention of the current investigation being conducted by Senator Long's Sub-judiciary Committee where blatant and outrageous Internal Revenue activity is being exposed. The wire-tap, electronic snoopers, mail cover, unauthorized opening of first-class mail, breaking into homes and seizing personal papers without search warrants, extortion and intimidation are standard operating procedure.

When faced with actual evidence the agents callously admitted conduct prohibited by both State and Federal penal law[60] but on all other interrogation refused to re-

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[58] *Aptheker et al. v. Secretary of State,* 84 S. Ct. 1659, 1669, 378 U. S. 500, 516; *Youngstown Corporation v. Sawyer,* 343 U. S. 579; *Cudahy Packing Company v. Holland,* 315 U. S. 357, 363; *Oklahoma Press Company v. Walling,* 327 U. S. 186, 213.

[59] Mr. Justice Harlan dissenting in *Malone v. Bowdoin,* 369 U. S. 643, 652.

[60] *Newsweek,* July 26, 1965, page 28, column 1.

spond claiming executive immunity which is only another name for the Fifth Amendment.[61]

Any citizen willing to purchase a transcript of the proceedings could prosecute them on the basis of their admissions in both the State and Federal Courts [62] in spite of the reluctance of the Department of Justice to perform this unpleasant task much in the nature of state officials when faced with criminal activity of their local police officers.[63]

In the analogous field of search and seizure, it became apparent after *Wolf v. Colorado,* 338 U. S. 25, that the state officials would not voluntarily respect Federal constitutional rights. *Mapp v. Ohio,* 367 U. S. 343, corrected this, whereupon everyone has now fallen into line. The field of protection has subsequently been extended to other rights.

Only restriction of the privilege doctrine will prevent the growing Federal bureaucracy from removing what yet remains of our traditional freedoms. Suppression of evidence is not a sufficient deterrent. Exposure to financial liability for clear violation of written law is required to terminate improper enthusiasm.

The United States Congress by enacting 26 U.S.C. 7214 and in particular subsection (a) (1) (Appendix p. 30), seems to provide a cause of action for willful oppression in collecting tax revenue. Although the situation presently before the Court is not specifically detailed in this legis-

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[61] See f.n. 28.

[62] *Vogel v. Gruaz,* 110 U. S. 311, 315.

[63] *Mapp v. Ohio,* 367 U. S., concurring opinion at p. 670.

lation, it would appear to be within its ambit of prohibition.[64]

18 U.S.C. 241, 242 (Appendix p. 30) is violated as is 42 U.S.C. 1985 (3) (Appendix p. 29). Violation of a statute creates a cause of action by implication.[65] Representative Federal cases are in accord.[66] "The rule is more than merely a canon of statutory interpretation. The disregard of the command of a statute is a wrongful act and a tort." [67]

All rights given petitioner under the Internal Revenue Code, its regulations and bureau procedure have been taken from him. However, the main right was that of appeal given by *Powell* and *Reisman*. ". . . a discriminatory denial of the statutory right of appeal is a violation of the equal protection clause of the Fourteenth Amendment, 316 U. S. 255." [68] Petitioner has been deprived of the right to

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[64] *Minnesota Mining and Manufacturing Company v. N. J. Wood Finishing Company*, 85 S. Ct. 1473, 1479, 381 U. S. 311, 321.

[65] *Restatement of Torts*, Section 286, approved by Pennsylvania Supreme Court in *Jardine v. Upper Darby Lodge*, 198 A. 2d 550, 553, 413 Pa. 626, 632.

[66] *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 39; *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (2 C.C.A.); *Neiswonger v. Goodyear Tire and Rubber Company*, 35 F. 2d 761 (E.D. Ohio); *Roosevelt Field, Inc. v. Town of North Hempstead*, 84 Fed. Supp. 456 (E.D. N.Y.); *Wills v. T.W.A.*, 200 Fed. Supp. 360 (S.D. Cal.); *Fitzgerald v. Pan-American Airways*, 229 F. 2d 499 (2 C.C.A.); *Hickman v. Taylor*, 170 F. 2d 327 (3 C.C.A.), refusing liability and *Petition of O'Boyle*, 161 F. 2d 966 (2 C.C.A.); *Kardon et al. v. National Gypsum Co.*, 69 Fed. Supp. 512, 513, 514 (E.D. Pa.).

[67] 69 Fed. Supp. at p. 513.

[68] *Dowd v. U. S. ex rel. Cook*, 340 U. S. 206, 208.

intervene, object to and appeal from an adverse decision concerning what he believes to have been an unnecessary, embarrassing and oppressive investigation into his affairs,[69] *Screws v. U. S.*[70] The victim of a conspiracy to deprive him of a trial, or one against whom unpossessed power has been used or who has been abused by possessed authority has a right to damages.[71] This principle has been approved by the Third Circuit Court of Appeals. "When conduct is declared criminal for the protection of a specified class of persons, there is created, by implication, a civil right of action for an offended member of the class." [72]

In the alternative, petitioner respectfully suggests that the case be remanded to the District Court and permission given him to amend.[73]

CONCLUSION

It is respectfully submitted that the Writ of Certiorari should be granted and the Judgment of the Third Circuit Court of Appeals reversed.

Respectfully submitted,

ALLEN N. BRUNWASSER,
Petitioner.

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[69] See *Jones v. S.E.C.*, 298 U. S. at p. 26.

[70] *Screws v. U. S.* 325 U. S. 91 (defendant killed to prevent trial, warrant manufactured retroactively).

[71] *Monroe v. Pape*, 365 U. S. 167.

[72] *Farmer v. Philadelphia Electric Company*, 215 Fed. Supp. 723, 729, affirmed March 12, 1964, 329 F. 2d 3; *Leedom v. Kyne*, 358 U. S. 184, 189.

[73] *U. S. v. Hougham*, 364 U. S. 310, 316, 317.

APPENDIX

4th AMENDMENT

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall ensue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

7th AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

28 U.S.C. Section 2072

§2072. Rules of civil procedure for district courts

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

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FEDERAL RULE OF CIVIL PROCEDURE 38(a)

Rule 38(a) Jury Trial

(a) Right preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

26 U.S.C. 7602, 7603

Sec. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to per-

form the act, or any other person the Secretary or his delegate may deem proper to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

Sec. 7603. Service of Summons.—A summons issued under section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

§7605. Time and place of examination

(a) Time and place.—The time and place of examination pursuant to the provisions of section 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602 the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's

books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

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26 C.F.R. 301.7602

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§301.7602-1 Examination of books and witnesses.

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax (including any interest, additional amount, addition to the tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, any authorized officer or employee of the Internal Revenue Service may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

(b) *Summons.* For the purposes described in paragraph (a) of this section the officers and employees of the Internal Revenue Service designated in paragraph (c) of this section are authorized to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person deemed

proper, to appear before a designated officer or employee of the Internal Revenue Service at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. The officers and employees designated in paragraph (c) of this section may designate any other employee of the Internal Revenue Service as the individual before whom a person summoned pursuant to section 6420(e)(2), 6421(f)(2), or 7602 shall appear. Any such other employee, when so designated in a summons, is authorized to take testimony under oath of the person summoned and to receive and examine books, papers, records, or other data produced in compliance with the summons. The authority to issue a summons may not be redelegated.

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§301.7603-1 Service of summons.

(a) *In general.* A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. The certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons.

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§301.7605-1 Time and place of examination.

(a) *Time and place.* The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421

(f)(2), or 7602 shall be such time and place as may be fixed by an officer or employee of the Internal Revenue Service and as are reasonable under the circumstances. In case of a summons under authority of section 7602(2) and §301.7602-1, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before an officer or employee of the Service shall not be less than 10 days from the date of the summons.

(b) *Restrictions on examination of taxpayer.* No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless an authorized internal revenue officer, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

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42 U.S.C. 1985(3)

If two or more persons in any state or territory conspire—for the purpose of depriving, either directly or indirectly, any person—of the equal protection of the laws, or of equal privileges and immunities under the laws;—and the person "is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Appendix

18 U.S.C. 241

"If two or more persons, conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same; . . .," this is a crime.

18 U.S.C. 242

Whoever under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States, ". . . shall be fined not more than $1,000 or imprisoned not more than one year or both."

26 U.S.C. SECTION 7214

§7214. Offenses by officers and employees of the United States

(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States—

(1) who is guilty of any extortion or willful oppression under color of law; or

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(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment; or

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shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

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THE ADMINISTRATIVE PROCEDURE ACT, SECTION 1002(b)

No process, requirement of a report, inspection or other investigative act or demand shall be issued, made or enforced in any manner or for any purpose except as authorized by law.

1959 CUMULATIVE BULLETIN (Pages 938-939)

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26 CFR 601.105: Examination of returns and claims for refund, credit or abatements; determination of correct tax liability.

(Also Part I, Section 1311, 7605; 1.1311(a)-1.)

(Also Part II, Section 3801, Regulations 118, Section 39.3801(a)-1.)

Income, estate, gift, excise, and employment tax cases closed by examination in the office of the District Director of Internal Revenue may be reopened as a result of additional information received by the District Director's office or as a result of post review action in the Regional Commissioner's office. However, the reopening of a case must have the approval of either the District Director or the Assistant Regional Commissioner (Audit).

SECTION 1. PURPOSE.

01. The purpose of this Revenue Procedure is to set forth the conditions applicable to the reopening of cases examined and closed in the office of a District Director of Internal Revenue.

SEC. 2. SCOPE.

.01 For the purpose of this procedure, a closed case is any income, estate, gift, excise or employment tax return closed by examination in the office of the District Director, in which the taxpayer has been notified in writing by the District Director of the adjustment in tax liability or the acceptance of the return as filed.

.02 It also includes estate tax cases subject to post review even though the closing letter has not been issued. It does not include any action pertaining to the reopening of cases or issues under the jurisdiction of the offices of the Appellate Division or the Regional Counsel.

SEC. 3. BACKGROUND.

.01 Cases closed in the office of the District Director may be considered for reopening as a result of additional information received by the District Director's office. This information may come from within or outside the Internal Revenue Service.

02. Cases closed in the office of the District Director may also be considered for reopening as a result of errors disclosed by the regional post review. Under the regional post review authority, delegated to the Assistant Regional Commissioner (Audit) at the time the National Office responsibility for that function was transferred to the regional offices, examined cases are reviewed to discover and identify the categories of most frequent procedural and technical errors in order to improve the quality, technical accuracy, and uniformity of the audit activity. The cases selected for post review from among those closed in the district are reviewed only after all administrative processing, including the assessment of additional taxes and the scheduling of overassessments, has been completed in the district office.

SEC. 4. CONDITIONS FOR REOPENING.

.01 It is the administrative practice of the Internal Revenue Service not to reopen cases previously closed by the District Director unless there has been substantial error, both in the amount and in relation to the total tax liability, or there is evidence of fraud, malfeasance, collusion, concealment or the misrepresentation of a material fact. Reopening as the result of additional information received by the District Director's office must have the approval of the District Director, and reopenings recom-

mended as a result of post review action must have the approval of the Assistant Regional Commissioner (Audit).

1955 CUMULATIVE BULLETIN
(Pp. 904-905)

Sec. 4. Use of Summons.

01. The summons may be used to compel relevant or material testimony and/or the production of relevant or material books, papers, records or other data for any of the following purposes:

1. Ascertaining the correctness of any return;

2. Making a return where none has been made;

3. Determining the liability of any person for any internal revenue tax;

4. Determining the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax; and

5. Collecting any internal revenue tax liability.

.02 The following persons may be summoned under the provisions of section 7602 of the Internal Revenue Code of 1954:

1. Persons liable for the tax;

2. Any officer or employee of such persons;

3. Any person having possession, custody or care of books of account containing entries relating to the business of the person liable for the tax; and

4. Any other person who may be deemed proper by the officer issuing the summons.

.03 When a witness requests that he be served with a summons as evidence of his legal duty to produce records or testify and indicates that he will voluntarily comply therewith, it will be issued for such purpose.

Sec. 5. Forms Used.

.01 The summons form consists of two pages. The first sheet is designated "Original" (Form 2039), with a certificate of service on the reverse side and the second sheet is designated "Attested Copy" (Form 2039A), with the pertinent sections of the Internal Revenue Code of 1954 on the reverse side. This is the form assembly which will be used by all persons authorized to issue a summons under the *provisions of section 7602 of the Internal Revenue Code of 1954. The face of the "Attested Copy" thereof shall be an exact copy of the "Original" except for the words "Attested Copy" and "Original" and the form number.*

.02 Section 7605 of the 1954 Code provides that the date and time fixed for appearance in response to a summons shall be such as are reasonable under the circumstances and shall not be less than 10 *calendar days from the date of the summons. Although a person summoned may indicate a willingness to comply with the requirements of the summons by testifying, or the delivery of books or records on a date earlier than that required by statute, the time for his appearance will, nevertheless, be shown on the summons as not less than 10 days from the date of the summons. This will not preclude the person summoned from submitting records for an earlier or immediate examination or the earlier giving of testimony.*

Sec. 6. Issuance.

.01 After the summons has been prepared it will be served in accordance with the provisions of section 7603, Internal Revenue Code of 1954. Officers and employees of the Internal Revenue Service authorized to issue a summons or who have authority to investigate and receive information as to matters relating to the Internal Revenue laws and regulations may serve a summons.

.02 Section 7603 of the Code provides that service shall be made by delivery in hand of an attested copy to the person to whom it is directed or by leaving an attested copy at his last and usual place of abode. The second sheet (Form 2039A) of the form assembly, bearing the words "Attested Copy," will be either handed to the person to whom it is directed or left at his last and usual place of residence either with some person present or in a place where the person summoned will be likely to find the copy.

.03 *The original of the summons (Form 2039), after the completion of the certificate of service, will be placed in the administrative file in the office of the issuing division.* If the person to whom it is directed neglects or refuses to comply with the requirements of the summons, the original will be used as a basis for enforcing compliance. Furthermore, as provided by section 7603 of the 1954 Code, the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons.

A line appears under the word "only" in the second line on Exhibit 2 but not on Exhibit 1. A dash appears on Exhibit 2 which does not appear on Exhibit 1 between that

word and "W.M." The fifth line on Exhibit 1 spells referred "reffered" whereas Exhibit 2 contains "referred."

The seventh line has a dot after the word "to" on Exhibit 1 which does not appear on Exhibit 2, which has a dash between that word and the following word which does not appear on Exhibit 1.

In addition, the writing on Exhibit 2 is larger than that on Exhibit 1 which contains words in a different position than the former alleged process.

FEDERAL RULE OF CIVIL PROCEDURE 56 (28 U.S.C.)

Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1964, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for

the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached

thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FEDERAL RULE OF CIVIL PROCEDURE 12(c) (28 U.S.C.)

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Appendix

FEDERAL RULE OF CIVIL PROCEDURE 24(a) (28 U.S.C.)

Rule 24. Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, effective March 19, 1948.

OPINION OF THE COURT

(Filed November 12, 1965)

Per Curiam.

The order of the United States District Court for the Western District of Pennsylvania of November 6, 1964 granting the motion for summary judgment on behalf of the Pittsburgh National Bank and John S. Warwick, defendants, and denying the motion for summary judgment of Allen N. Brunwasser, plaintiff, was proper and will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDER
SUR PETITION FOR REHEARING

Present: Kalodner, Chief Judge, and McLaughlin, Staley, Hastie, Ganey, Smith and Freedman, Circuit Judges

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
McLaughlin,
Judge

Dated:
December 27, 1965